Supreme Court, U.S.
FILED

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No. _____

In The
Supreme Court of the United States

In the Matter of SHMUEL B. KLEIN,
an attorney and counselor-at-law

SHMUEL B. KLEIN,
Petitioner,
-against-

GRIEVANCE COMMITTEE FOR THE
NINTH JUDICIAL DISTRICT,
Respondent.

On Petition for Writ of Certiorari
to the Court of Appeals of the
State of New York

Petition for a Writ of Certiorari

Shmuel B. Klein, Petitioner, pro se
268 West Route 59
Spring Valley, NY 10977
914-425-2682

Counsel, pro se for Petitioner

58pp

Petition for a Writ of Certiorari

Questions Presented for Review

1. (a) The questions presented for review are as follows:

(i) Whether an attorney disciplinary charge may be based upon a court order found to violate due process?

(ii) Whether an attorney disciplinary charge may be based upon an order which violated the free exercise clause of the United States Constitution?

(iii) Whether a 5 year suspension from the practice of law is violative of equal protection?

(b) A list of all parties to the proceeding in the court whose judgment is sought to be reviewed is as follows:

For the Petitioner:

Shmuel B. Klein, Petitioner, pro se

268 West Route 59, Spring Valley, NY 10977

914-425-2682

For the Respondent:

Grievance Committee for the ninth judicial district of the State of New York, by Gloria A. Bunze,

399 Knollwood Road, Suite 200, White Plains, NY 10603

(c) See attached

(d) Citations of the official and unofficial reports of the opinions and orders entered in the case by courts or administrative agencies:

None as of this filing.

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(daily ed. Oct. 26,1993) 15
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(e) A concise statement of the basis for jurisdiction in this Court, is as follows:

(i) The date of the judgment or order sought to be reviewed is December 22, 1997.

The New York Court of Appeals which is the court of last resort in New York State decided important constitutional questions in a way that conflicts with the Due Process Clause, the First Amendment and Equal Protection Clause of the United States Constitution. The first decision deciding that there was no right to appeal was dated September 23, 1997. The decision denying a motion for reargument is dated December 22, 1997.

(iv) The statutory provision believed to confer on this Court jurisdiction to review on a writ of

certiorari the judgment or order in question is Rule 10 of this Court in that the New York Court of Appeals decided an important constitutional question in a way that conflicts with the Due Process Clause, First Amendment and Equal Protection Clause of the United States Constitution and so far departed from the acceptable and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers and that the state court of last resort decided an important federal question in a way that conflicts with relevant decisions of this Court.

(v) Notifications required by Rule 29.4(b) are not applicable as there is no statute in question.

f) The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case are as follows:

(i) First Amendment of the United States Constitution: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

(ii) Fifth and Fourteenth Amendments of the United States Constitution guaranteeing due process and Equal Protection;

(iii) The Fourteenth Amendment clause of the United States Constitution as it binds the States and has been held to contain implicitly not only the standards of fairness and justice found within the Fifth Amendment's clause but also to contain many guarantees that are expressly set out in the Bill of Rights. See also French v. Barber Asphalt Paving Co.,

181 U.S. 324, 328 (1901).

(g) A concise statement of the case setting out the facts material to consideration of the questions presented is as follows:

This Petition for a Writ of Certiorari seeks review of a state-court judgment which denied a right to appeal of the New York Court of Appeals, the court of last resort in New York, from the Appellate Division, Second Department, the Court of first impression, notwithstanding the fact that the order underlying the suspension was vacated by the United States Court of Appeals for the Second Circuit, as it was found to have been in violation of the Due Process clause. See page 13 of the appendix.

The stage in the proceedings, both in the court of first instance and in the appellate courts, is

completed as the motions were denied. See page 1 and 3 of the appendix.

Federal Constitutional questions sought to be reviewed were raised initially by motions to dismiss in the court of first impression (the New York Supreme Court Appellate Division) and then as a motion for Leave to Appeal in the Court of last resort in New York State, the New York Court of Appeals. Both motions were denied. See pages 1, 3 and 13 of the appendix.

(h) A direct and concise argument amplifying the reasons relied on for allowance of the writ is as follows:

No attorney disciplinary charge can be based upon orders that violate due process, or the First Amendment and Equal Protection.

Your petitioner was suspended from the

practice of law based upon an order found to violate due process. See page 13 of the appendix.

After the suspension order was entered, the United States Court of Appeals for the Second Circuit reversed an order upon which the suspension order was based, because that underlying order violated "due process". It is therefore urged that this Court grant this petition as no attorney suspension order can be based on any order actually found to violate due process.

"[T]he profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise". Ex Parte Burr, 22 U.S. (9 Wheat.) 529, 530, 6 L.Ed. 152 (1824).

Discipline or disbarment of an attorney presents a case or controversy within the meaning of

Article III of the Constitution, because it has concrete adverse effects on the attorney that can be rectified by further judicial action. This Court has adjudicated numerous attorney disciplinary matters. E.g., In re Snyder, 472 U.S. 634 (1985); Theard v. United States, 354 U.S. 278 (1957); Ex parte Garland, 71 U.S. 333, 378-79 (1866).

This Court explicitly has held that state court bar admissions and bar disciplinary decisions present "cases or controversies" under Article III. In In re Summers, 325 U.S. 561, 568, 65 S.Ct. 1307, 1312, 89 L.Ed. 1795 (1945), the Supreme Court held that it had jurisdiction to review a state supreme court's denial of admission to that state bar because that denial involved a case or controversy. The Court stated: "Where relief is thus sought in a state court against the action of a committee, appointed to advise the

court, and the court takes cognizance of the complaint without requiring the appearance of the committee or its members, we think the consideration of the petition by the Supreme Court, the body which has authority itself by its own act to give the relief sought, makes the proceeding adversary in the sense of a true case or controversy." Id. at 567-68, 65 S.Ct. at 1311-12. The Court emphasized that "[t]he form of the proceeding is not significant. It is the nature and effect which is controlling." Id. at 567, 65 S.Ct. at 1311.

Bar disciplinary actions, and disbarments are essentially judicial in nature and thus present a case or controversy under Article III. See Summers, 325 U.S. at 566-67, 65 S.Ct. at 1311 (1945) ("A case arises, within the meaning of the Constitution, when any question respecting the Constitution, treatise or laws of the United States has assumed "such a form that

the judicial power is capable of acting on it.'").

Although a State "is free to regulate procedure of its courts in accordance with it own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); West v. Louisiana, 194 U.S. 258, 263 (1904); Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897); Jordan v. Massachusetts, 225 U.S. 167, 176 (1912).

The power of a State to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them and to deny access to its courts is also subject to restrictions imposed by the contract, full faith and credit, and privileges and immunities clauses of the Constitution.

Angel v. Bullington, 330 U.S. 183 (1947).

No agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State." Ex parte Virginia, 100 U.S. 339, 346-47 (1880).

It is now the settled doctrine of this Court that the Due Process Clause embodies a system of rights based on moral principles so deeply imbedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived

by our whole history. Due Process is that which comports with the deepest notions of what is fair and right and just." Solesbee v. Balkcom, 339 U.S. 9, 16 (1950) (Justice Frankfurter dissenting). Due process is violated if a practice or rule "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

The suspension of my license to practice law, based upon an order found to have violated the "due process clause" should be reviewed by this Court.

Your petitioner was also suspended based upon an order which sanctioned him for insisting on his First Amendment Right to practice his religion by bringing

a motion to arbitrate before a Rabbinical Court.

In Sherbert v Verner (374 US 398, 403) this Court stated that an incidental burden on the right to free exercise of religion may be justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate' " (citing NAACP v Button, 371 US 415, 438). The compelling state interest is dispute resolution. Seeking arbitration before a Rabbinical Court cannot be a basis to suspend an attorney, especially when the matter was submitted to arbitration before the Rabbinical Court.

In Marsh v. Chambers, 463 US 783, 812 "even when the government is not compelled to do so, by the free exercise clause, it may to some extent, act to facilitate the opportunity of individuals to practice their religion." I should not be suspended for insisting

upon my First Amendment rights to arbitrate before a Rabbinical Court.

Religion is not only among fundamental rights, but is a "preferred" right of the "highest order." See 139 CONG. REC. 514350-01, 514364 (daily ed. Oct. 26,1993) (statement of Sen. Hatch) ("religious liberty ... is the most fundamental liberty any human being can claim . . . Even the most scorned in our society, prison inmates, have a legitimate interest in religious liberty.") ; S. REP. No. 111, 103rd Cong. , 1st Sess., at 9 & n.22 (1993), reprinted in 1993 U.S.C.C.A.N. 1892 (citing cases) see also Gilbert v. Minnesota, 254 U.S. 325, 343 (1920) (Brandeis, J., dissenting) (Fourteenth Amendment guarantees more than the liberty to acquire and enjoy property); Palko v. Connecticut, 302 U.S. 319, 325 (1937) (per Cardozo, J.) (Bill of Rights made applicable to the states to preserve principles of

justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental"); Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring) (fundamental liberties are those "of the individual which history has attested as indispensable conditions of an open as against a closed society') Abington School Dist. v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) ("The First Amendment's guarantees, as applied to the States through the Fourteenth Amendment are to be read together . . . to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end.").

The most "exacting scrutiny" of government actions in four instances - when government regulation: (1) is not neutral, i.e., targets religious

conduct or believers either facially or as applied in particular instances, Hialeah, 508 U.S. at 533-34; Smith, 494 U.S. at 878-79; (2) is not generally applicable, i.e., selectively burdens religious exercise, Hialeah, 508 U.S. at 542; Smith, 494 U.S. at 879-81; (3) creates system of individualized government assessment of the reasons for the relevant conduct, following individualized exemptions from a general requirement, Hialeah, 508 U.S. 537; Smith, 494 U.S. at 884; or (4) burdens religious freedom in conjunction with other constitutional rights, i.e., a hybrid situation, Smith, 494 U.S. at 881-82.

In each of these four instances, the government action "is invalid unless it is justified by a compelling interest is narrowly tailored to advance that interest." Hialeah, 508 U.S. at 533 (citing Smith, 494 U.S. at 878-79).

Basing a suspension upon an order which violated your petitioner's First Amendment free exercise of his religion cannot be a basis to suspend his license to practice law.

Further, the degree of the suspension was a violation of the Equal Protection Clause of the Constitution and requires this Courts review.

The classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). See also Brown-Forman Co. v. Kentucky, 217 U.S. 563, 573 (1910). Use of the latter standard did in fact result in some invalidations. E.g., F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920); Stewart Dry

Goods Co. v. Lewis, 294 U.S. 550 (1935); Mayflower Farms v. Ten Eyck, 297 U.S. 266 (1936).

No suspension of the length imposed upon your petitioner can be found in any reporter for the conduct alleged. The arbitrary length of the suspension has no fair of substantial relation to the object of discipline so that all persons are treated alike.

CONCLUSION

WHEREFORE, it is respectfully submitted that the within Petition be in all respects granted.

Dated: March 17, 1998
Spring Valley, NY

Respectfully,

Shmuel Klein, pro se
268 Route 59 West
Spring Valley, NY 10950
(914) 425-2682

CERTIFICATE OF SERVICE

STATE OF NEW YORK)
COUNTY OF ROCKLAND)

I, Asmaa Suqi, affirms under the penalties of perjury pursuant that I am not a party to this action and that I am over the age of 18 years old. I have an office at 268 Route 59, Spring Valley, New York 10977, and I served the within Petition for Writ of Certiorari and Appendix on March 18, 1998, by depositing a three copies thereof in a post-paid wrapper, placing it in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York, overnight mail, addressed to:

Gloria A. Bunze
399 Knollwood Road
Suite 200
White Plains, NY 10603

Asmaa Suqi

Affirmed and subscribed to before me 3/18/98

Notary

SHMUEL D. KLEIN
Notary Public, State of New York
No. 2KL4941210
Qualified in Rockland County
Commission Expires 7/25/1998

APPENDIX

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State of New York
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty second-second day of December 1997

Present, HON. JUDITH S. KAYE, Chief Judge, presiding.

----------X

In the Matter of Shmuel B. Klein, an attorney and counselor-at-law. Mo. No. 1395

Grievance Committee for the Ninth Judicial District,
Respondent,
Shmuel B. Klein,
Appellant.

----------X

A motion for renewal and/or reargument to the Court of Appeals in the above case having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Stuart M. Cohen
Clerk of the Court

State of New York
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-third day of September 1997

Present, HON. JUDITH S. KAYE, Chief Judge, presiding.

----------X

2-25 Mo. No. 1395
In the Matter of Shmuel B. Klein,
an attorney and counselor-at-law.

Grievance Committee for the
Ninth Judicial District,
Respondent,

Shmuel B. Klein,
Appellant.

----------X

The appellant having filed notice of appeal and a motion for leave to appeal and for a stay to the Court of Appeals in the above cause, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, on the Court's own motion, that the appeal be and the same hereby is dismissed,

without costs, upon the ground that no substantial constitutional question is directly involved; and it is

ORDERED, that the said motion for leave to appeal be and the same hereby is denied; and it is

ORDERED, that the said motion for a stay be and the same hereby is dismissed as academic.

Stuart M. Cohen
Clerk of the Court

CORRECTED PER CURIAM OPINION

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 269 August Term, 1997
(Argued: September 24, 1997) (Decided: , 1997)

Docket No. 96-5133

IN RE: MOSES STEIN,
Plaintiff,

SHMUEL KLEIN,
Plaintiff-Appellant,
v.

ULSTER SAVINGS BANK,
Defendant-Appellee.

BEFORE: ALTIMARI, PARKER AND KEITH,[*]
Circuit Judges

Appeal from a judgment entered in the United States District Court for the Southern District of New York (Charles L. Brieant, J.) on October 29, 1996, affirming sanctions imposed on appellant by the bankruptcy court (Stuart Bernstein, U.S. Bankruptcy Judge) on June 8, 1994. We hold that it was error for the bankruptcy court to impose sanction without providing appellant with notice or an opportunity to be heard.

Vacated and remanded.

Shmuel Klein, Spring Valley, NY,
for Plaintiff-Appellant.

(Anthony Carlini, Law Office of Howard C. St. John, Kingston, NY, of counsel), for Defendant-Appellee.

Per Curiam:

I. BACKGROUND

Schmuel (sic) Klein is an attorney who was representing debtor Moses Stein. On November 15, 1993, Klein filed a Chapter 13 bankruptcy petition on Stein's behalf to stop the imminent foreclosure sale of Stein's residence by Ulster Savings Bank ("Ulster"). The foreclosure was automatically stayed pursuant to 11 U.S.C. § 362.

On March 10, 1994, Ulster moved to have the automatic stay lifted on the grounds that Stein had not made any post-petition payments on his mortgage. In response to this motion, Klein produced copies of three uncancelled checks as proof that Stein had made the post-petition mortgage payments. Nonetheless, on March 15, 1994, Judge Bernstein lifted the stay, holding that the bank had made a prima facie demonstration that post-petition payments had not been made.

The district court found that on May 17, 1994, Stein and Klein failed to appear at a section 341 meeting with Bankruptcy Trustee Jeffrey Sapir and United

States Bankruptcy Judge Jeffrey Gallet.
Klein contends that they failed to appear because Stein was ill and that they informed Trustee Sapir that they would be unable to attend the meeting. Sapir moved to have Stein's Chapter 13 petition dismissed for failure to prosecute and for failure to deposit funds with the trustee.[1]

On March 31, 1994, Stein moved before Judge Bernstein to reargue the lifting of the automatic stay. Judge Bernstein granted this motion and heard reargument on April 6, 1994. At no time did Klein inform Judge Bernstein that a motion to dismiss the petition was pending before Judge Gallet.

At reargument, Klein again produced copies of three uncancelled checks as proof that the post-petition mortgage payments had been made. This time, Ulster conceded that it had received the checks, but contended that it was not aware of this fact when it made its original motion to lift the stay. Ulster explained that when it received the checks, they were contained in a sealed, self- addressed, stamped envelope that was mixed among a pile of other documents that Klein sent to Ulster. Judge Bernstein stated that he would reimpose the automatic stay if Stein paid Ulster all
post-petition payments due in full within one week. The court also sanctioned Klein in the amount of $500 to compensate Ulster for its costs and attorney's fees.

On April 7, 1996, Judge Gallet granted the motion to dismiss. Klein did not appear in response to this motion. He contends that his absence was due to

excessive traffic en route to the court.

On April 26, 1994, Klein filed a second Chapter 13 petition on behalf of Stein. This petition falsely represented that Stein had not filed a previous bankruptcy petition within six years.

Ulster moved for relief from the automatic stay or alternatively for dismissal of the petition. On June 8, 1994, Judge Bernstein heard argument on this motion and dismissed the second petition. Judge Bernstein found that the second petition--filed just eighteen days after the first petition was dismissed--violated 11 U.S.C. § 109(g). 11 U.S.C. § 109(g) provides:

Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if--(1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case.

Judge Bernstein held that Stein's failure to appear at the section 341 meeting constituted a "failure to abide by an order of the Court." He further found that Klein filed the second petition with "personal knowledge that the debtor was ineligible to file under Section 109(g)(1) and that the new petition was interposed to delay the foreclosure." Judge Bernstein characterized Klein's behavior as

"[making] a mockery of the prior proceedings and orders which this court has issued." Judge Bernstein then charged Klein with various acts of dishonesty and malfeasance in connection with Stein's bankruptcy petitions, including: (1) placing the mortgage payments in a sealed, self-addressed, stamped envelope and burying the envelope within a pile of papers; (2) lying about whether the post-petition mortgage payments had been made; (3) failing to appear at the section 341 meeting; (4) failing to inform Judge Bernstein, prior to reargument of Ulster's motion to lift the automatic stay, that the trustee's motion to dismiss the petition was pending before Judge Gallet; (5) failing to appear in response to the trustee's motion to dismiss before Judge Gallet; and (5) filing a second petition in violation of § 109(g)(1). Based on this conduct, and acting pursuant to Rule 9011 of the Federal Rules of Bankruptcy Procedure, Judge Bernstein sanctioned Klein $2,500 for abuse of process.[2]

Klein appealed the imposition of sanctions to the district court. The district court agreed with Judge Bernstein that Klein's filing of the second bankruptcy petition constituted an abuse of the bankruptcy process. The court further concluded that Judge Bernstein did not abuse his discretion in imposing sanctions. Finally, the court held that it was not error for the bankruptcy court to impose sanctions without a hearing. It explained that while Congress expressly amended Fed.R.Civ.P. 11 in 1993 to require notice and an opportunity to be heard before the imposition of sanctions, it did not amend Rule 9011 to include

such a requirement.

II. DISCUSSION

In Ames Dep't Stores, Inc. v. Sayre Cent. Corp, 76 F.3d 66 (2d Cir. 1996), we held that "due process requires that courts provide notice and opportunity to be heard before imposing any kind of sanctions." 76 F.3d at 70. In Ames Dep't Stores, Inc., the district court, sua sponte and without notice, decided that the law firm of Skadden, Arps, Slade, Meagher & Flom was not entitled to any attorney's fees for its services in connection with a bankruptcy appeal. We remanded the case for a recalculation of the sanctions because "[n]othing in the ... case even approached a notice and opportunity to be heard before the district court ordered a denial of Skadden's requested fee." Id.

Although the district court in Ames Dep't Stores, Inc. did not expressly state that it was sanctioning Skadden, Arps pursuant to Rule 9011,[3] we clearly stated in that opinion that notice and an opportunity to respond is necessary prior to the imposition of "any kind of sanctions." Id. (emphasis added); see Rounseville v. Zahl, 13 F.3d 625, 632 (2d Cir. 1994) (Rule 11); Schoenberg v. Shapolsky Publishers, Inc., 971 F.2d 926, 936 (2d Cir. 1992) (28 U.S.C. § 1927); see also Martin v. Brown, 63 F.3d 1252, 1262 (3d Cir. 1995) ("[T]he fundamental requirements of due process--notice and an opportunity to respond--must be afforded before any sanction is imposed.").

We now expressly extend this holding to cover sanctions imposed pursuant to Rule 9011. Therefore, because Klein had no notice or opportunity to be heard before the bankruptcy court imposed sanctions, we direct the district court to remand this matter to the bankruptcy court to give Klein an opportunity to respond to Judge Bernstein's charges. A full evidentiary hearing, however, is not required. See International Ore & Fertilizer Corp. v. SGS Control Servs., Inc., 38 F.3d 1279 (2d Cir. 1994) (finding no due process violation where attorney threatened with Rule 11 sanctions received no hearing but had notice and opportunity to respond); see also Big Rapids Mall Assocs. v. Mutual Trust Life Ins. Co., 98 F.3d 926, 929 (6th Cir. 1996) (upholding imposition of Rule 9011 sanctions where attorney had notice and an opportunity to respond by brief and oral argument); Childs v. State Farm Mut. Auto. Ins. Co., 29 F.3d 1018, 1027 (5th Cir. 1994) ("Simply giving the individual accused of a Rule 11 violation a chance to respond through the submission of a brief is usually all that due process requires."); cf. Jensen v. Federal Land Bank, 882 F.2d 340, 342 (8th Cir. 1989) (remanding case for a hearing where attorney was not given notice and an opportunity to respond before Rule 9011 sanctions were imposed).

Because we are vacating the sanctions order, we need not reach Klein's argument that the bankruptcy court's imposition of a $2,500 sanction constituted an abuse of discretion.

Vacated and remanded.

[*] The Honorable Damon J. Keith of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

[1] The portion of this finding regarding Bankruptcy Judge Gallet's presence at this section 341 meeting is probably erroneous, as bankruptcy judges are not permitted to attend such meetings. See 11 U.S.C. § 341(c). However, the presence or absence of Bankruptcy Judge Gallet at this section 341 meeting is of no significance to this Court's analysis of this appeal.

[2] Judge Bernstein also imposed other fines to cover Ulster's expenses in responding to the second bankruptcy petition. These fines are not at issue in this appeal.

[3] The case was remanded in part to allow the bankruptcy court to specify the source of its authority to impose sanctions. See Ames Dep't Stores, Inc., 76 F.3d at 70.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

8272Z
S/hu

____AD2d____
GUY JAMES MANGANO, P.J.
LAWRENCE J. BRACKEN
ALBERT M. ROSENBLATT
SONDRA MILLER
WILLIAM C. THOMPSON, JJ.

95-09901

In the Matter of Shmuel B. Klein,
an attorney and counselor-at-law,

Grievance Committee for the Ninth Judicial District, petitioner;
Shmuel B. Klein, respondent.

DISCIPLINARY proceeding instituted by the Grievance Committee for the Ninth Judicial District. The respondent was admitted to the practice of law by this court on June 29, 1988, under the name Shmuel Berel Klein. By order of this court dated January 3,

1996, the issues raised in the petition and in the answer were referred to the Honorable Lawrence Martin, as Special Referee, to hear and report.

Gary L. Casella, White Plains, N.Y. (Gloria A. Bunze of counsel), for petitioner.

Shmuel Klein, Spring Valley, N.Y., respondent pro se

PER CURIAM. The petition contains three charges of professional misconduct against the respondent. After a hearing, the Special Referee sustained all three charges. The Grievance Committee now moves to confirm, and the respondent cross moves to disaffirm, the report of the Special Referee.

Charge One alleged that the respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, in violation of Code of Professional Responsibility DR 1-102(A)(4) (22

NYCRR 1200.3[a][4]), conduct that adversely reflects on his fitness to practice law, in violation of Code of Professional Responsibility DR 1-102(A)(8) (22 NYCRR 1200.3[a][8]), and conduct that is prejudicial to the administration of justice, in violation of Code of Professional Responsibility DR 1-102(A)(8) (22 NYCRR 1200.3[a][8]), in connection with his handling of a bankruptcy matter in the United States Bankruptcy Court entitled In Re Moses Stein, Debtor. The facts underlying Charge One are as follows:

1. In an "Extract of Bench Ruling Dismissing Chapter 13 Case and Imposing Sanctions on the Debtor's Attorney" (hereinafter bench ruling) dated June 9, 1994, the Honorable Stuart M. Bernstein, United States Bankruptcy Judge, found that the respondent, the debtor's attorney, engaged in

improper conduct.

2. In the bench ruling, the court found that the respondent attempted to present an ex parte order to show cause to the court on or about March 28, 1994, which the court declined to entertain. The object of the order to show cause was to reimpose an automatic stay on the foreclosure sale of the debtor's home.

3. The court further found that, when the respondent again presented the order to show cause in the presence of the bank's attorney on or about March 30, 1994, he initially contended that a foreclosure sale of the debtor's home was imminent, which was not the case since no sale had been scheduled.

4. The respondent then represented that the debtor's confirmation hearing was

scheduled for April 7, 1994, and that it was necessary to resolve the stay issue before then. Based on the respondent's representations, the court scheduled the hearing on the debtor's motion for April 6, 1994.

5. The court found that the respondent gave false testimony at the hearing on April 6, 1994, and that the respondent lied to cover his office's mistake in sending three checks for past due mortgage payments to the bank's attorneys rather than to the bank.

6. At the hearing on April 6, 1994, the court sanctioned the respondent for the aforementioned conduct, ordering him to pay $500 to the bank. When the bench ruling was reduced to writing, some nine weeks later, the

respondent still had not paid the sanction.

7. The court further found that, throughout the many proceedings in the Stein bankruptcy matter, the respondent failed to disclose that the Chapter 13 trustee had moved before another United States Bankruptcy Court Judge, Judge Jeffrey Gallet, to dismiss or convert the matter pursuant to 11 USC §1307(c)(1), (e)(4) due the debtor's failure to appear at a "section 341" hearing and to deposit necessary funds with the trustee.

8. In the bench ruling the court noted that the trustee's motion was returnable on April 7, 1994, the date the respondent represented to the court as the date of debtor's confirmation hearing. On that date, however, neither the debtor nor the respondent appeared in

response to the trustee's motion or at the confirmation hearing. By an order dated April 7, 1994, Judge Gallet granted the trustee's motion and dismissed the case.

9. The court also noted that the foreclosure sale was rescheduled for the end of April 1994. On April 26, 1994, on the heels of the previous dismissal and on the eve of the sale, the respondent, on behalf of the debtor, filed a second bankruptcy petition.

10. The court found that the second bankruptcy petition constituted an "abusive" Chapter 13 filing that was not done in good faith, but to frustrate the legitimate rights of the bank. The court further found that the second petition flouted a prior order of the court granting conditional relief from the stay,

caused the bank unnecessary expenses, and abused the bankruptcy process.

11. The court also found the respondent falsely certified, in response to a question on the second bankruptcy petition, that the debtor had not filed a bankruptcy petition during the previous six years. The court found that the respondent knew, based on his personal knowledge, that the debtor was ineligible to file the second bankruptcy petition since he had filed a petition on the debtor's behalf in November 1993, which was dismissed on April 7, 1994. Thus, the court found that the second petition was interposed to delay the foreclosure.

12. Based on the aforementioned violations, the court directed the respondent to pay, within 30 days, sanctions in the sum of $3,500; $2,500

to the Clerk of the United States Bankruptcy Court and $1,000 to the bank as compensation for its expenses, including attorney's fees.

Charge Two alleged that the respondent engaged in conduct that adversely reflects on his fitness to practice law, in violation of Code of Professional Responsibility DR 1-102(A)(8) (22 NYCRR 1200.3[a][8]), and conduct that is prejudicial to the administration of justice, in violation of Code of Professional Responsibility DR 1-102(A)(5) (22 NYCRR 1200.3[a][5]), in connection with his handling of a legal malpractice case entitled *Eliezer Goldstock and American Jewish Society for Distinguished Children, Inc. v. Shmuel B. Klein.* The facts underlying Charge Two are as follows:

1. In a decision and order of the Supreme Court, Rockland County, dated October 6,

1994, the Honorable Anthony A. Scarpino, Jr., *inter alia*, dismissed 10 of the respondent's affirmative defenses in the above-entitled action, finding that either they were not defenses to the alleged claim or they were wholly without merit. The court noted that, despite the plaintiff's challenge, the respondent failed to making any showing of merit to the dismissed defenses.

2. In the aforementioned decision and order, the court warned the respondent and opposing counsel "that the abusive nature of the pleadings, correspondence, and conduct in this action must stop here. The hyperbole, harassment, and histrionics will no longer be tolerated. Failure to heed this warning will result in sanctions and referral by the Court to

the Grievance Committee." The court also stated that no further motions could be made without prior court approval.

3. Upon information and belief, Justice Scarpino was reassigned on or about January 1, 1995, and the matter was transferred to the Honorable Kenneth W. Rudolph.

4. On or about March 16, 1995, Justice Rudolph sent the respondent and opposing counsel a letter in which he stated that the "stern warning" issued by Justice Scarpino, Jr., in his decision and order dated October 6, 1994, had "been ignored and had gone unheeded".

5. Justice Rudolph's letter also stated that, despite Justice Scarpino's order that no further motions be made without prior court approval,

counsel continued the behavior described by Justice Scarpino as if the prior order never existed.

6. Justice Rudolph's letter advised counsel that a hearing would be held on March 21, 1995 to determine whether sanctions would be imposed against them for dilatory and oppressive conduct in violation of the prior orders of the court.

7. In a decision and order dated March 29, 1995, Justice Rudolph, *inter alia*, found that, "[i]n complete contravention of the prior order of this Court and in violation of the preliminary conference order to serve his answer to the amended complaint the [respondent] has made an Omnibus Motion to compel arbitration, to renew previous motions to strike, to dismiss

plaintiffs' complaint to the dismiss the action as to the individual plaintiff, Eliezer M. Goldstock".

8. In the March 29, 1995, order the court also found that the omnibus motion included the respondent's third motion to compel arbitration, the two prior applications having been denied by the same court. Morevover, the respondent admitted to the court that he had no legal basis for making such application and that his request for arbitration was based on religious laws.

9. The court further found that, when opposing counsel agreed to a discontinuance of the action of behalf of the individual plaintiff pursuant to the respondent's motion (see subparagraph 7 above), the respondent said, "I

changed my mind, I want him in the action," and the respondent did not want that portion of the relief requested. The court stated, "[T]his contemptuous response clearly demonstrates [the respondent's] intent to harass his adversary and grind this litigation to a halt in a sea of frivolous motions."

10. The court further stated that the respondent's attempt to revisit the previous decisions of the court was equally egregious. Despite the court's admonitions, the respondent displayed what appeared to be a complete lack of understanding of the serious nature of the proceedings by submitting a further affirmation in support of his omnibus motion on March 24, 1995, three days after a hearing on sanctions was completed by the court.

11. Based on the aforesaid conduct, the court imposed sanctions of $1,000 against the respondent, ordering him to pay that sum to the Lawyers' Fund of Client Protection of the State of New York within 20 days and to file proof of payment with the Clerk of the Supreme Court, Rockland County, within 10 days thereafter.

12. On or about May 4, 1995, Justice Rudolph sent the respondent a letter in which he stated that opposing counsel had been given permission to file a motion for summary judgment in response to which the respondent interposed affirmative defenses previously dismissed by a prior order of the court. The letter further stated that the respondent's correspondence indicated the respondent's

awareness that he was not to revisit the previously dismissed defenses.

Charge Three alleged that respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, in violation of Code of Professional Responsibility DR 1-102(A)(4) (22 NYCRR 1200.3[a][4]), and/or conduct that adversely reflects on his fitness to practice law, in violation of Code of Professional Responsibility DR 1-102(A)(8) (22 NYCRR 1200.3[a][8], by making a false and/or misleading statement in his answer to a complaint of professional misconduct. The facts underlying Charge Three are as follows:

1. On or about March 14, 1995, the Grievance Committee received a complaint of professional misconduct against the respondent alleging that he lied and/or made

misrepresentations regarding his malpractice insurance or in the course of defending the aforementioned legal malpractice.

2. In his written answer to the complaint, dated March 21, 1995, the respondent stated, "I have never had a malpractice claim and try very hard not [sic] to avoid them."

3. The respondent, in fact, has had at lease one additional malpractice claim filed against him as a third-party defendant in an action entitled *Thanlenberg v. Rosenfeld and Charles/Charles v. Klein*. The third-part summons and verified complaint were refiled on or about April 27, 1994, in the Supreme Court, Rockland County.

At the rehearing conference the respondent made the following admissions: With regard to

Charge One, the respondent admitted that, by an order dated April 7, 1994, Judge Gallet granted the trustee's motion and dismissed the Stein bankruptcy petition. The respondent also admitted that, in his written answer to a complaint of professional misconduct, he stated, "I have never had a malpractice claim and try very hard not [sic] to avoid them."

In view of the documentary evidence submitted by the Grievance Committee, the respondent's admissions, and the testimony adduced at the hearing, the Special Referee properly sustained all three charges against the respondent. Thus, the petitioner's motion to confirm the Special Referee's report in granted, and the respondent's cross motion to disaffirm the Special Referee's report is denied.

In determining the appropriate measure of discipline to impose, we have considered the

mitigating factors proffered by the respondent with regard to Charge Two, including the nature of the relationship between him and Mr. Goldstock and the fact the underlying actions was ultimately discontinued with prejudice.

Under the totality of the circumstances, the respondent is suspended from the practice of law for a period of five years.

MANGANO, P.J., BRACKEN, RONSENBLATT, MILLER and THOMPSON, JJ., concur.

ORDERED that the petitioner's motion to confirm the report of the Special Referee is granted; and it is further,

ORDERED that the respondent's cross motion to disaffirm the report of the Special Referee is denied; and it is further,

ORDERED that the respondent, Shmuel B.

Klein, is suspended form the practice of law for a period of five years, commencing July 30, 1997, and continuing until the further order of the court, with leave to the respondent to apply for reinstatement no sooner than six months prior to the expiration of the said period of five years upon furnishing satisfactory proof (a) that during the said period he refrained from practicing or attempting to practice law, (b) that he had fully complied with this order and with the terms and provisions of the written rules governing the conduct of disbarred, suspended, and resigned attorneys (22 NYCRR 691.10), and (c) that he had otherwise properly conducted himself; and it is further,

ORDERED that pursuant to Judiciary Law § 90, during the period of suspension and until the further order of this court, the respondent, Shmuel B. Klein, shall desist and refrain from (1) practicing law

in any form, either as principal or agent, clerk or employee of another, (2) appearing as an attorney or counselor-at-law before any court, Judge, Justice, board, commission or other public authority, (3) giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) holding himself out in any way as an attorney and counselor-at-law.

ENTER

Martin H. Brownstein

Clerk